Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Commercial Spectrum	)	WT Docket No. 05-211
Enhancement Act and Modernization of the	)	
Commission's Competitive Bidding Rules and	)	
Procedures	)	

REPLY COMMENTS OF ANTARES, INC.

Antares, Inc. ("Antares") hereby submits these Reply Comments in the captioned proceeding,[1] which explores whether the Commission should modify its "designated entity" or "DE" rules to restrict the award of DE benefits in situations where a DE has an established, material relationship with certain types of large communications service providers. Antares filed Comments in this proceeding on February 24, 2006 in which it supported the Commission's tentative conclusion to modify the DE rules to preclude the award of auction benefits to DEs that have a material relationship with a large, in-region incumbent wireless service provider, but Antares opposes extending this restriction to DEs that have relationships "with entities with significant interests in communications services".

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1 In the Matter of Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Further Notice of Proposed Rulemaking in WT Docket No. 05-211*, FCC 06-8, released February 3, 2006 ("*FNPRM*").

The Commission received over thirty sets of Comments responding to the proposals raised in the *FNPRM*. While a handful of commenters opposed making any changes to the DE rules, and an equal number supported the notion of expanding the proposed restriction to other providers of communications services, the vast majority of commenters agreed with Antares that the Commission should adopt its tentative conclusion to limit large, in-region incumbent wireless service providers from having material relationships with DEs who receive bidding credits or other auction preferences. In response to the Comments, Antares submits the following Reply Comments and request for clarification.

I. Defining "Wireless Gross Revenues"

The majority of filers who commented specifically on this issue supported Council Tree's proposal to define "large, in-region incumbent wireless providers" as those entities having "average gross wireless revenues" exceeding $5 billion.[2] While there appears to be some confusion as to Council Tree's exact position on this issue (as borne out by some confusion in interpretation among the commenters), Antares interprets Council Tree's proposal to be that a carrier's gross revenues attributable to the provision of wireless services should be measured for each year of three year period, and averaged, and if the three year average exceeds $5 billion, then the carrier would be deemed a large carrier, making its DE partner ineligible to receive

[2] *See, e.g.,* Comments of Leap Wireless International, Inc. ("Leap") at p. 15; Comments of MetroPCS, Inc. ("MetroPCS") at pp. 9-10; Comments of Minority Media and Telecommunications Council ("MMTC") at p. 2.

auction bidding credits. Other commenters, such as MMTC, advocate adoption of a size test based on a minimum number of subscribers – in MMTC's case – 10 million.

Based on the revenue and subscriber information compiled by Council Tree,[3] Antares observes that both the Council Tree revenue and MMTC subscriber proposals arrive at the same result – large, in-region incumbent wireless carriers would be defined as the five existing, nationwide CMRS service providers. While Antares believes that the $5 billion average wireless revenue figure is the most logical benchmark to employ in order to determine an entity's true "size" and "market power", it does not oppose adding a total subscriber element to the size test, as long as the total number of subscribers is not the sole measurement used.

Two commenters suggest that the Commission adopt a much lower average wireless gross revenue benchmark of $1 billion.[4] Antares replies that in the event the Commission were to extend the proposed restriction to other communications service providers, the $1 billion benchmark would be entirely too low. As mentioned above, the majority of commenters in this proceeding oppose extending the proposed restriction to other communications service providers. One of the primary reasons given is that this type of restriction would unnecessarily limit access to capital for DEs that do not already have existing relationships with the

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3 Comments of Council Tree Communications, Inc. at pp. 18-19.

4 *See, e.g.,* Comments of Wireless Broadband Service Providers Association ("WBSPA") at p. 15; Comments of Centennial Communications Corp. at p. 6.

nationwide CMRS carriers.[5] For example, one likely source of financing for DEs is venture capital funds. However, an interested fund that already has communications companies in their investment portfolios could be precluded from investing in DEs simply based on the revenues thrown off by the fund's existing communications investments.

Finally, Antares requests that if the Commission does adopt any version of an average gross revenues test, it clarify that the financial benchmark adopted would be applied to each individual investor in a DE, rather than applying the financial benchmark in the aggregate. In other words, if a DE were to attract more than one potential non-attributable investor, as long as each investor's average gross revenues were less than the benchmark adopted, the DE structure would be acceptable under the revised DE rules, rather than combining the average gross revenues of all non-attributable investors.

II. Spectrum Aggregation Issues and Defining "Significant Geographic Overlap"

In the *FNPRM,* the Commission requested comment on whether geographic overlap should be an element in establishing any additional restriction on the availability of DE benefits.[6] In response, several commenters urged the Commission to re-think its prior decision refusing to adopt a spectrum aggregation

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5 *See, e.g.,* Comments of Madison Dearborn Partners, LLC at p. 2.

6 See *FNPRM* at p. 11.

limit for AWS spectrum.[7] While these proposals vary, Antares generally supports Leap's suggestion to impose a revised "bright-line" spectrum cap approach in situations where a carrier's licensed service area has a significant geographic overlap with an area to be licensed at auction. Specifically, Leap proposes that the Commission should preclude arrangements where the aggregate amount of CMRS and AWS spectrum held in the overlapping areas would exceed 80 MHz. Antares agrees that Leap's proposal generally strikes the right balance between allowing incumbent carriers to obtain additional spectrum in the upcoming AWS auction, while protecting against spectrum hording by incumbents. However, Antares believes that a more appropriate spectrum cap should be 60 MHz.[8]

Over the past 18 months, the FCC has examined and approved three major mergers of CMRS carriers. As part of its required public interest analysis, the Commission conducted a competitive analysis of each of the proposed transactions to ensure that no competitive harm would occur in the affected markets. As part of that competitive analysis, the Commission decided to "flag" for more in-depth review any market where the newly-combined entity would hold 70 MHz or more of

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[7] See, e.g., Comments of Leap at pp. 4-5; Comments of MMTC at pp. 9-10; Comments of MetroPCS at p. 10.

[8] For purposes of calculating an entity's spectrum holdings, Antares also encourages the Commission to include all functionally equivalent types of spectrum holdings, such as spectrum licenses in 700 MHz and 2.5 GHz bands, in addition to CMRS spectrum holdings.

CMRS spectrum.[9] Antares asserts that since the FCC recently utilized a 70 MHz spectrum-holding standard to trigger a market concentration analysis, it certainly is an appropriate starting point for assessing excessive spectrum aggregation by nationwide CMRS carriers that partner with DEs. However, as recognized by MMTC, given the recent consolidation in wireless markets, "where the percentage of CMRS market controlled by the five largest wireless carriers is far greater today than it was when the CMRS aggregation rules were in effect" (just three years ago),[10] Antares believes that a spectrum cap of 60 MHz per market (which is still higher than the bright-line cap utilized by the Commission when the spectrum cap rule sunset three years ago), is more reasonable than Leap's proposal of 80 MHz.

III. Auction And Short Form Application Timing Issues and Compliance With Section 309(j)(3)(E)(ii) of the Act

In our Comments, Antares encouraged the Commission have all applicable DE rule revisions finalized before asking hopeful AWS auction participants to file their short-form applications. Several commenters elaborated on this issue, and Antares supports certain of the proposals made. In particular, the Joint Comments of Columbia Capital LLC, MC Venture Partners and TA Associates, Inc. ("Joint

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[9] See, e.g., Applications of AT&T Wireless Services, Inc., Transferor, and Cingular Wireless, Corp., Transferee, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21564 ¶ 107 (2004); In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, WT Docket 05-63, FCC 05-148, released August 8, 2005, at ¶¶ 62-65.

[10] Comments of MMTC at p. 9.

Commenters"), Leap and MetroPCS all strongly encourage the Commission to finalize any DE rule revisions sufficiently in advance of the short-form application filing deadline to permit "rational business planning".[11] As the Joint Commenters assert, it is difficult for "investors such as the Joint Commenters to make informed business decision regarding the prospective bidders they will back if the applicable rules are unsettled. Financial markets and financial investors hate uncertainty, and the requisite certainty would be lacking if financial institutions were forced to make their investment decisions too early in the process."[12]

Even those commenters who oppose any revisions to the DE rules recognize that unduly rushing the proposed rule revision/AWS auction application deadline is not simply a bad business idea. As the CTIA correctly observes, [13] there are statutory restrictions that prohibit the FCC from engaging in the very type of rushed rule making/auction scheduling that is occurring here. According to Section 309(j)(3)(E)(ii) of the Communications Act, the Commission is obligated, "after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services." Clearly, by requiring AWS auction applicants to file their Form 159s, and then to subsequently "amend their applications on or

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11 Joint Comments at p. 6; *see also* Comments of Leap at p. 17-18 ; Comments of MetroPCS, Inc. at pp. 11-14.

12 Joint Commenters at p. 6.

13 Comments of CTIA – The Wireless Association, at p. 15.

after the effective date of the rule changes"[14] if necessary, the Commission is not complying with the statutory requirements of Section 309(j)(3)(E)(ii). Consequently, Antares supports the requests for a brief, sixty day period after the adoption of an Order in this proceeding before requiring prospective applicants to file their short form applications. Allowing for such a brief interval certainly will not unduly delay the introduction of additional spectrum into the market, yet it will allow interested parties to engage in some semblance of rational business planning, while also complying with relevant statutory mandates.

IV. Bidding Credits

While not raised in the *FNPRM*, several commenters reiterated the need for larger bidding credits for bona fide DEs in auctions of commercial wireless spectrum where the Commission has refused to adopt closed bidding.[15] Based on the experience of its affiliate Northcoast Communications, LLC in several prior auctions with open and closed bidding (Auctions 11 and 35), Antares fully comprehends the impact of meaningful bidding credits in an open bidding auction, and the likely impact on the auction success of bona fide DEs when less significant bidding credits are not available. Consequently, Antares strongly supports the call

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14 *FNPRM* at p. 13.

15 See, e.g., Comments of Aloha Partners, L.P. at p. 5; Comments of Carroll Wireless, L.P. at pp. 7-8; Comments of Poplar Associates, LLC at p. 4; Comments of WBSPA at p. 9.

for the adoption of more meaningful bidding credits for small businesses in the AWS auction. In particular, Antares agrees with Aloha that a third bidding credit of at least 40% should be adopted for the smallest DE participants in the AWS auction. However, contrary to the Aloha and Council Tree proposals, Antares suggests that a more reasonable attributable average annual gross revenue test for this smallest class of DEs is $5 million. As Council Tree recognizes,[16] a $5 million level is sufficiently different from the $15 million "very small business" revenue level to permit new entrants of varying histories and business sizes to secure opportunities to enter the wireless marketplace.

V. Clarification of the "Controlling Interest Standard" in the Context of Officer/Director Attribution

While Antares does not support the "preferred" general position advocated by Wirefree Partners III, LLC ("Wirefree") to put off the proposed DE rule changes in advance of the AWS auction, Antares believes that Wirefree raises several thoughtful observations regarding the current state of DE business relationships. Antares specifically supports Wirefree's request that the Commission use this rule making proceeding to clarify the disparity between the "controlling interest" rule and Section 1.2110(c)(2)(F) of the rules, which states that all officers and directors are deemed to be "controlling interests of the applicant". Wirefree accurately explains the very real dilemma presented by these two conflicting rules: The

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16 *See* Letter from Messrs. Steve C. Hilliard and George T. Laub, Council Tree Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 02-353, 04-356, RM-10956 (June 13, 2005).

Section 1.2110(c)(2)(F) requirement that all officers and directors of an applicant are deemed to be controlling interests essentially guts the financial structure flexibility that the controlling interest standard was intended to create for DEs. It is standard business practice for significant investors in any small business to require a board of directors seat in exchange for their investment. However, if a DE is precluded from complying with such legitimate requests of potential investors due to the likely impact on DE eligibility, the negative impact on the DE's ability to attract investors is dramatic. Consequently, Antares strongly supports Wirefree's request that the Commission clarify that "only the affiliation of officers and directors of board members representing or appointed by the qualifying controlling interest in a DE should be counted in determining the DE's size.

VI. Conclusion

In sum, Antares continues to encourage the Commission to modify the DE rules to preclude DEs from having material relationships with large, incumbent wireless service providers, but to avoid adoption of any additional restrictions covering DE relationships with entities that do not already control CMRS spectrum or provide wireless service. The majority of the comments the Commission received in this proceeding support this approach. Antares also encourages the Commission to carefully consider the other rule revision proposals as outlined above in these Reply Comments.

Respectfully submitted,
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